SUPREME COURT, U. S.
FILED
MAY 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1500

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, AND PROFESSIONAL LIFE AND CASUALTY COMPANY,

Petitioners,

vs.

ANN ARBOR TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

By: William D. Barense
DOBSON, GRIFFIN and BARENSE, P.C.
500 City Center Building
Ann Arbor, Michigan 48108
Attorneys for Ann Arbor
Trust Company

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-4765—962-4732

SUBJECT INDEX

Index of Authorities i

Argument 2

The Decision Below is Supported by Federal Law 2

The Decision Below Is In Accordance With the Court's Appellate Powers And Is Not An Abuse of Discretion 11

Conclusion 13

INDEX OF AUTHORITIES

Page

Cases:

Attorney General v *Michigan Surety Co.* 364 Mich 299, 110 N.W. 2d 677, (1961) 9

Christensen v *New England Mutual Life Insurance Company* 197 Ga. 807, 30 S.E. 2d 471 (1944) 5

Clay v *Sun Insurance Company* 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960) 3

England v *Louisiana State Board of Medical Examiners*, 384 U.S. 885, 86 S.Ct. 1924, 16 L.Ed.2d 998 (1966) 12

In re *Cox Estate* 383 Mich. 108 (1970) 8

Garvin v *Rosenau* 455 F.2d 233 (C.A. 6, 1972). 8

Gay v *Board of Registration Commissioners*, 466 F.2d 879 (C.A. 6, 1972) 8

Hawks v *Hamill* 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed.610 (1933) 8

Kaiser Steel Corporation v *W. S. Ranch Company* 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968) 10,11

Keidan v *Universal C.I.T. Credit Corporation* 327 F.2d 616 (1964) 8

Krakoff v *United States* 431 F.2d 847 (1970) . 8

Landis v *North American Co.* 299 U.S. 248, 81 L.Ed. 153, 57 S.Ct. 163 (1936) 11

Louisiana Power & Light Company v *City of Thibodaux* 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1163 (1959) 2,3,4,5,9,11,13,14

McClellan v *Carland* 217 U.S. 268, 54 L.Ed. 762, 30 S.Ct. 501 (1910) 11

Meredith v *City of Winter Haven* 320 U.S. 228, 88 L.Ed. 9, 64 S.Ct. 7 (1943) 3

Morgan v *Equitable Life Assurance Society of The United States* 446 F.2d 929 (C.A. 10, 1971) 11,12

Railroad Commission of Texas v *Pullman Company* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) 3,4

Southern Pacific Railroad v *United States* 168 U.S. 1, 42 L.Ed. 355, 18 S.Ct. 18 (1897) ... 11

Spector Motor Service, Inc. v *O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951) 12

United States v *Leiter Minerals, Inc.*, 381 U.S. 413, 85 S.Ct. 1575, 14 L.Ed.2d 692 (1965) 12

Statute:

28 U.S.C. Sec 1651 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1500

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, AND PROFESSIONAL LIFE AND CASUALTY COMPANY,

Petitioners,

vs.

ANN ARBOR TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARGUMENT

The Decision Below Is Supported By Federal Law.

Petitioners contend the Court of Appeals abused its discretion when it affirmed the District Court judgments but remanded the case to the District Court with instructions to re-open if the Michigan Supreme Court decides the identical issue of state law in companion cases already pending in the State courts contrary to the opinion of the Court of Appeals. Respondent contends that the Court of Appeals could have abstained from making a decision on the summary judgments under the circumstances and the procedure followed by the Court of Appeals being something less than actual abstention is therefore not an abuse of discretion and is also within its auxiliary appellate powers.

Respondent asserts the reasoning of the majority, concurring, and dissenting opinions in *Louisiana Power & Light Co.* v *City of Thibodaux*, 360 U.S. 25 (1959) is controlling of the issue here.

In *Thibodaux*, the District Judge, in a diversity case, stayed further proceedings at pre-trial until the Supreme Court of Louisiana interpreted the meaning of a specific statute granting authority to a city to expropriate private property. This abstention required the municipality to commence a separate action for declaratory judgment in the state trial courts.

The majority opinion in *Thibodaux* states:

> "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law. Thus in *Railroad Comm'n* v *Pullman Co.*, 312 U.S. 496, 499, it was said: 'Had we or they (the lower court judges) no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.' "

This Court in *Thibodaux* also pointed out the distinction between it and *Meredith* v *City of Winter Haven*, 320 U.S. 228, (footnote 2, page 27) stating that in *Winter Haven* the issue was whether or not a District Court was compelled to surrender federal jurisdiction to a state court, whereas in *Thibodaux*, as in the case at bar, the question is whether or not a federal court is jurisdictionally disabled from seeking the "controlling light" of the State Supreme Court where interpretation of state law is required. In *Thibodaux* this Court also established that abstention can occur in cases other than equity[1] and based its action and reasoning on a deeper policy of

---

[1]See also *Clay* v *Sun Insurance Co.*, 363 U.S. 207, 80 S.Ct. 1222, 4 L. Ed. 2d 1170 (1960), a later case, where abstention was sustained in a common law action seeking money damages not dealing with state eminent domain law. The dissent in *Thibodaux* finds the existence of an eminent domain action was not decisive of the majority opinion (page 37) which analysis appears sound.

comity derived from the very nature of Federalism itself (page 28) in holding that abstention by a Federal Court is a wise and productive discharge of that Court's judicial duty where the Court also seeks to ascertain the meaning of a disputed state statute from the only tribunal in power to speak definitively — the courts of the state passing the law (page 29). This Court concluded:

> "Caught between the language of an old but uninterpreted statute and the pronouncement of the Attorney General of Louisiana, the District Judge determined to solve his conscientious perplexity by directing utilization of the legal resources of Louisiana for a prompt ascertainment of meaning through the only tribunal whose interpretation could be controlling — the Supreme Court of Louisiana. The District Court was thus exercising a fair and well-considered judicial discretion in staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana." (page 30)

The dissent in *Thibodaux* contended abstention can only be sanctioned to avoid deciding a federal question or when a question of comity exists, also citing *Railroad Comm'n.* v *Pullman Co., supra,* in support. The dissent also pointed out that in *Thibodaux* there was not the slightest hazard of friction with a state (page 34) because the state, by

its constituent organ, the City of Thibodaux, itself urged the District Court to adjudicate the state law issue (page 35), and the added expense and attendant delay caused by abstention would work affirmatively to the benefit of the party seeking abstention because it would have possession and use of the property during the period of delay (page 43).

Respondent contends that not only do the facts in the case at bar meet the requirements of the *Thibodaux* majority opinion for granting abstention but also meet the requirements of the dissenting opinion for granting abstention.

Respondent, as plaintiff in the District Court, asserted that under Michigan Supreme Court decisions a suicide provision excluding coverage if death results from "suicide, sane or insane" does not *ipso facto* preclude recovery because the test for determining coverage under such phraseology is not dependent on the doing of a physical act but requires the probing of the actual state of mind of the deceased to determine his ability to form an intent at the time of his self-imposed death. Respondent further asserted that this proposition of law in Michigan was set forth in five Michigan Supreme Court cases which are cited in the opinion of the Circuit Court of Appeals.[2] (Petition, Appendix A, p.2a)

---

[2]The opinion of the Court of Appeals also refers to the annotation at 9 A.L.R. 3d 1015 (1966) showing the general unsettled state of the issue. *Christensen* v *New England Mutual Life Ins. Co.*, 197 Ga 807, 30 SE 2d 471 (1944) referred to at page 1025 thereof is a thorough and well-reasoned support of Respondent's position.

Respondent's contention that the applicable Michigan law is found in these cases, was accepted by Petitioners in the District Court and Court of Appeals and by those Courts also. However, what seemed to Respondent as clear law was described by the Court of Appeals as being generally unsettled. The Court of Appeals also expressed its uncertainty as to the interpretation the Supreme Court of Michigan would place upon its five earlier decisions.

The District Court also expressed its doubts, stating:

> "More importantly, none of the cases has directly decided if the insured's failure to comprehend the physical consequences of his act will allow recovery under an insurance policy containing a 'suicide, sane or insane' clause. Dicta in two cases militates in favor of recovery under such circumstances, *Streeter* v *Insurance Society*, 65 Mich. 199 (1887); *Sabin* v *National Union*, 90 Mich. 177 (1892). Dicta in another case, however, indicates that recovery would not be allowed, *Blackstone* v *Insurance Co.*, 74 Mich. 592 (1889). In *Streeter*, the court said that if one does an act in a state of unconsciousness, or involuntarily, whether he is sane or insane, such act is nothing more or less than accidental, and will not operate to forfeit the policy. In that case, however, the court said there was no evidence that the act was

BLEED THROUGH

> involuntary, or that the insured was unconscious when he inflicted upon himself the fatal wound." (Petition, Appendix D, page 10a)

In spite of this, however, and contrary to Respondent's position that the cited cases were not dicta but were decided on plaintiff's failure to prove the requisite lack of intent, the District Court granted the motions for summary judgment when discovery answers and depositions showed that plaintiff's expert psychiatric witness would testify that the deceased killed himself while in a state of dissociative reaction while unable to comprehend the physicial consequences of his act and the city police detective in charge of the investigation testified on Petitioners' deposition that the police could find no motive for the killings and the cause of the killings was Dr. Dukay's mental condition.

In conclusion the District Court stated:

> "It is, therefore, the Court's feeling that the better rule is that which holds that the insurer need not prove that the insured had the capacity to comprehend the physical nature or consequence of his act in order to avoid liability."[3] (Petition, Appendix D, p. 12a)

---

[3]It would appear that the District Court erred re burden of proof. Under an accident type policy plaintiff must prove the absence of all policy conditions negating coverage and in an ordinary life policy plaintiff has the duty of going forward with the proofs after defendant shows a self-inflicted death. The policies here involved are of both types.

Thus, the District Judge, assuming the cases were dicta, failed to follow the Michigan law regarding the binding effect of dictum (in re *Cox Estate*, 383 Mich. 108, 117 (1970)) and substituted a personal feeling for existing admitted dicta contrary to the position of this Court expressed in *Hawks* v *Hamill*, 288 U.S. 52, 60.

Against this background the Court of Appeals, after recognizing the law as being unsettled and after expressing its concern as to the interpretation the Michigan Supreme Court would put on its own existing prior decisions, affirmed the summary judgments rather than staying proceedings but instructed the District Court to reopen the cases in the event the Supreme Court of Michigan rendered decision contrary to the conclusion of the Court of Appeals affirming the District Court as to the meaning of the existing Michigan cases.

Thus the Court of Appeals did not abstain[4] but granted Petitioners their final judgment. The Court also exercised its discretion to protect Respondent's

[4]The Sixth Circuit has adhered to a strict policy regarding abstention. However, under its tests in addition to the matter of comity it appears here that, as admitted by the Court of Appeals, only the Michigan Supreme Court can authoritatively construe the opinions, state regulation of insurance is involved (*Gay* v *Board of Registration Commissioners*, 466 F.2d 879 (1972)), First Amendment rights are not involved (*Garvin* v *Rosenau*, 455 F.2d 233 (1972)) and the problem is not one of lack of state interpretation (*Keidan* v *Universal C.I.T. Credit Corporation*, 327 F.2d 616 (1964)), *Krakoff* v *United States*, 431 F.2d 847 (1970)).

beneficiaries from being in a position where they could prevail in the Michigan courts and lose in the Federal courts on the identical issue of Michigan law, the ultimate determination of which it is agreed rests with the Michigan Supreme Court, by requiring the District Court to reopen the cases only if the Michigan Supreme Court decided the issue of state law contrary to Petitioners' position.

Even if we assume the Court of Appeals did abstain here, abstention is justified because the matter of comity is strongly present. Not only is the insurance business affected with a strong public interest in Michigan (*Attorney General* v *Michigan Surety Co.*, 364 Mich. 299, 325 (1961)) and not only have the District Court and Court of Appeals found the controlling Michigan law to be unclear, but that law is not a statute yet to be interpreted by the Michigan Supreme Court (as in *Thibodaux, supra*) but is the very opinions of the highest court in Michigan which itself will be called upon to interpret its *own language* in presently pending cases (contrary to *Thibodaux, supra)* and in so doing will be saying what it meant.

It would appear under such circumstances that not only would a "hazard of friction" exist if the Court of Appeals irretrievably (as to Respondent) told the Michigan Supreme Court what it meant but the decision of the Court of Appeals maintains that sense of balance and respect essential to the efficient intermeshing of the federal and state systems and

furthers the efficient administration of justice for the benefit of parties who are citizens of each sovereignty.

The District Court described the issue of law here as "novel" (Petitioners' Petition, Appendix D, p.11a). In *Kaiser Steel Corporation* v *W. S. Ranch Company*, 391 U.S. 593 this Court, in a *per curiam* opinion, ordered the Tenth Circuit Court of Appeals to abstain from decision in a case where the meaning of the words "public use" in the New Mexico constitution were controlling. This Court stated:

> "*The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts* and since a declaratory judgment action *is actually pending there*, in all likelihood that resolution will be forthcoming soon. *Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all* other businesses and land owners concerned with the use of this vital resource . . . Federal jurisdiction will be retained in the District Court in order to insure a just disposition of this litigation should anything prevent a prompt state court determination." (page 594, emphasis added)

The similarities to the case at bar are striking. Here the issue has also been described as novel, actions governed by the same issue are pending in the state court, and interpretation of ultimately

controlling language is involved. In *Kaiser* as in *Morgan* v *Equitable Life Assurance Society*, infra, a consistent rule of law was held to be pre-dominant and a justification for abstention itself. In the case at bar the Court of Appeals has accomplished this end without the necessity for abstention.

The Decision Below Is In Accordance With The Court's Appellate Powers And Is Not An Abuse of Discretion.

Respondent asserts Petitioners' cases are not persuasive. *Southern Pacific Railroad Company* v *United States*, 168 U.S.1 (1897) is an estoppel case and is out of context here; *Landis* v *North American Co.*, 299 U.S. 248 (1936) does not deal either with abstention or comity; in *McClellan* v *Carland*, 217 U.S. 268 (1910) the state law was clear, no significant matter of comity existed and this Court did not render judgment but only remanded to the Court of Appeals to have the District Court explain its actions in abstaining; and *Meredith* v *Winter Haven*, *supra* has already been distinguished by this Court in *Thibodaux*, *supra*. In the cases cited by Petitioners neither a plaintiff or a defendant was faced with the prospect of both prevailing and losing on the identical issue of state law, an exceptional circumstance.

Even in the absence of any question of comity, proper administration justifies the action of the Court of Appeals. In a suit seeking recovery under an insurance policy similarly requiring interpretation of state insurance law the Circuit Court of Appeals

for the Tenth Circuit voluntarily abstained pending state court decision stating:

> "Sound judicial administration requires that such person, and the other parties in interest receive the same treatment in each court." *Morgan* v *Equitable Life Assurance Society of the U.S.*, 446 F.2d 929, 932 (C.A. 10, 1971).

The Court of Appeals' writ of mandate is also in accordance with the express provisions of 28 U.S.C. Sec. 1651 allowing writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

As noted in Petitioner's petition, there are five companion cases presently pending in the state courts. After the order of the District Court granting Petitioners' motions for summary judgment, identical motions on the same issue of law were made in the state trial court seeking summary judgments. All of said policies contain the same phrase, "suicide, sane or insane," and the issue as to the interpretation of the existing Michigan cases is presently squarely before the Michigan courts.

It is obvious that some time will pass[5] before the issue of law is finally decided by the Michigan Supreme Court, however, this delay is only

[5]Any delay involved can only be charged to overcrowded dockets and not to Respondent. In the following cases delays of from six to eight years occurred because of stays: *Spector Motor Service, Inc.* v *O'Connor*, 340 U.S. 602 (1951), (seven years); *England* v *Louisiana State Board of Medical Examiners*, 384 U.S. 885 (1966), (six years); *U.S.* v *Leiter Minerals, Inc.*, 381 U.S.413 (1965) (dismissed as moot eight years after abstention ordered).

BLEED THROUGH

burdensome to Respondent. Petitioners have received their judgments and assuming the Michigan Supreme Court confirms the case interpretations by the District Court and Court of Appeals no further effort or expense by them is necessary. In the meantime they can continue to use the language in their policies which they have so far contended protects them against liability for all self-inflicted deaths in Michigan. Thus the fear expressed in the dissent in *Thibodaux, supra* that any delay will inure to the benefit of the party receiving a stay is not present here; obviously Respondent prefers to have the issue of law settled in the state courts as soon as possible and have trial in both systems as soon as possible particularly because interest does not run on a claim in the federal courts until rendition of judgment.

Further, Petitioners have the opportunity under Michigan law to appear in any appellate proceeding as *amicus curiae* and submit briefs in support of their position. In the unusual event that this matter does not reach the Supreme Court of Michigan, Petitioners still are not compelled to do anything; they have their judgments.

CONCLUSION

It is clear that the function of courts is to do justice to the citizens utilizing the courts. This basic proposition was recognized by the Court of Appeals and it protected Respondent's beneficiaries against the monstrous possibility of winning in the state

court and losing in the federal court on the same issue of Michigan law without any effective remedy therefor, and it did so without any unreasonable prejudice, if any at all, to Petitioners.

This action by the Court of Appeals is justified and is not an abuse of discretion either under the doctrine of abstention or under their appellate powers. In neither event can the result here achieved by men of good will be charged as a "substantial departure from the accepted and usual course of judicial proceedings or an impedient to the efficient administration of justice"; in fact the result is the opposite.

In conclusion and in the words of Mr. Justice Stewart from his concurring opinion in *Thibodaux, supra*, Respondent asserts that the Circuit Court of Appeals "in a conscientious effort to do justice" protected Respondent without harming Petitioners. "Under the circumstances presented, I think the course pursued was clearly within the . . . (Court of Appeals) allowable discretion."

WHEREFORE Respondent prays said Petition for Writ of Certiorari be denied with costs to Respondent.

Respectfully Submitted,

By: /s/ William D. Barense
DOBSON, GRIFFIN AND
BARENSE, P.C.
Attorneys for Respondent
500 City Center Building
Ann Arbor, Michigan 48108

BLEED THROUGH